In the Supreme Court of the United States

October Term, 1979
No. 79-1809

HOWARD L. MOON,
Petitioner,

vs.

ROADWAY EXPRESS, INC.,
Respondent.

BRIEF OF RESPONDENT ROADWAY EXPRESS, INC. IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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Respondent ROADWAY EXPRESS, INC. ("Roadway") respectfully urges the Court to deny Petitioner's request for issuance of a Writ of Certiorari to review the decision of the Court of Appeals for the Fifth Circuit. The Court of Appeals affirmed the decision of the United States District Court holding that there is no private cause of action under Section 503 of the Rehabilitation Act, as amended ("the Act"), 29 U.S.C. §793. The decisions below are required by applicable precedent of this Court and by Congressional intent with respect to enforcement of that provision.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Georgia in *Moon v. Roadway Express, Inc.* is reported at 439 F.Supp. 1308 (N.D. Ga. 1977). The United States District Court for the Northern District of Texas also found no private cause of action should be inferred under Section 503 in *Rogers v. Frito-Lay, Inc.*, 433 F.Supp. 200 (N.D. Tex. 1977).

Plaintiffs Moon and Rogers appealed these decisions, and the cases were consolidated for review by the Court of Appeals on December 14, 1977. Its decision holding that no private cause of action is implied under Section 503 is reported as *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074 (5th Cir. 1980). Rogers has also filed a Petition for Writ of Certiorari. The Docket Number assigned by the Clerk of this Court to the *Rogers* case is 79-1810, and this Brief responds to the issues raised in both Petitions for Certiorari.

QUESTION PRESENTED

Whether a private cause of action should be inferred under Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 793.

STATEMENT OF THE CASE

Petitioners Moon and Rogers are handicapped individuals who allege they were discharged by their former employers, Roadway and Frito-Lay, in violation of the Rehabilitation Act's Section 503 obligations on federal contractors. Roadway and Frito-Lay deny they have violated the Act, but the narrow issue presented here concerns only federal court jurisdiction to hear an action based on this statute which explicitly provides only for administrative agency

enforcement. They contend, as all of the courts below have found, that the Act itself, its legislative history and other expressions of Congressional intent confirm that Congress intended Section 503 to be enforced through agency action in accordance with Section 503(b), not through private lawsuits initiated by and controlled by private litigants. Individuals who believe the Act has been violated "may file a complaint with the Department of Labor" which must take action to investigate the matter and to ensure compliance with the law. Section 503(b), 29 U.S.C. 793(b).

SUMMARY OF ARGUMENT

Title V of the Rehabilitation Act of 1973, as amended, contains three sections which are relevant to this case. Section 503, the provision here in issue, requires certain federal contractors to take affirmative action to employ qualified handicapped individuals. Section 501 requires federal employers to take affirmative action to employ handicapped individuals and Section 504 provides that federal grantees may not discriminate based on handicap.[1]

As originally enacted, Title V provided an enforcement mechanism only for Section 503. Under Section 503(b) the Department of Labor must investigate and take action on complaints filed by individuals who believe the provision has been violated. The Department of Labor promptly issued Regulations designed to implement Section 503 and delegated enforcement responsibility to the Office of Federal Contract Compliance Programs (OFCCP). These Regulations were developed in consultation with the House and Senate Committees responsible for overseeing com-

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1. Section 503 as well as Sections 501, 504 and 505 of Title V of the Act are set forth in an Appendix which begins at page 30. These provisions are codified as 29 U.S.C. §§791, 793, 794 and 794a.

pliance with Section 503. The Regulations express preference for obtaining voluntary contractor compliance through conciliation and persuasion. Nonetheless, the Regulations provide for agency enforcement of the Section 503 obligation on behalf of individual complainants through court actions, through withholding progress payments on jobs, through terminating of contracts, and through debarring contractors from doing business with the government. 41 CFR §60-741.28.

While as originally enacted Sections 501 and 504 did not provide any statutory means for enforcement, in 1978 Congress added enforcement mechanisms for these provisions by adding a new section to the Act. Now Section 501 complainants are entitled to the remedies, procedures and rights set forth in Section 717 of the Civil Rights Act of 1964. 29 U.S.C. §794a(a)(1). Section 504 complainants may enforce its provisions using the remedies, procedures and rights set forth in Title VI of the Civil Rights Act of 1964. 29 U.S.C. §794a(a)(2).

Recent Supreme Court decisions have emphasized the importance of statutory provisions as evidence of Congressional intent. If it were not already clear from the structure of Section 503(b) since it provides for an administrative enforcement procedure, the 1978 Amendments giving private court enforcement procedures under Sections 501 and 504, but not changing Section 503, should make Congressional intent with respect to Section 503 absolutely clear.

When the legislative history of Title V's provisions, actions and statements by the Department of Labor, and the historical context within which Section 503 was enacted are considered, the correctness of the decision of the Court below is even more evident. On at least five occasions between 1976 and 1978, spokesmen for organizations

representing handicapped individuals asked House and Senate Committees to amend the provisions of Title V to provide explicitly for private causes of action in Court. These individuals specifically told the Committees that the Courts were not inferring Congressional intent to permit private actions under any provision of Title V, and they asked that Title V be amended for that purpose. As discussed above, in 1978 Amendments were made to Sections 501 and 504 but not to Section 503.

In fact, throughout the period since enactment of Section 503, Congressmen and Agency officials have publicly discussed the enforcement mechanisms under Section 503 with pregnant omission of any reference to a private cause of action under that provision. When Section 503 was enacted in 1973 and to the present, if Congress wished to provide for private, as well as agency enforcement of employment-related laws, it has provided for dual enforcement mechanisms in the statutes. In sum, all indicia of legislative intent require conclusion that Congress did not intend to permit a private action under Section 503.

ARGUMENT AND CITATION OF AUTHORITY

IN CONSIDERING WHETHER A PRIVATE CAUSE OF ACTION SHOULD BE INFERRED, THE COURT BELOW HAS PROPERLY FOCUSED ON ASCERTAINING CONGRESSIONAL INTENT

Introduction

Within the past year the Court has decided six cases[2] in which it was asked to infer the existence of a private cause of action where one was not statutorily or constitutionally provided. In these cases the Court has reemphasized that the duty of the judiciary is to ascertain legislative intent with respect to enforcement procedures and to avoid decisions based on judicial notions of how laws might be enforced more vigorously or what Congress should have provided.

As the court below recognized, the federal courts are not common law courts of general jurisdiction. *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1078 (5th Cir. 1980). As Roadway will show, the precedent relied on by Petitioners Moon and Rogers ignores compelling evidence of contrary Congressional intent, in favor of permitting private actions to foster certain judicial notions of efficiency of enforcement or social policy.

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2. *Kissinger v. Reporters' Committee for Freedom of the Press*, 48 USLW 4223 (1980); *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis*, 48 USLW 4001 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979); *Davis v. Passman*, 442 U.S. 228 (1979); *Cannon v. University of Chicago*, 441 U.S. 677 (1979); *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

I.

Structure of Section 503 Specifying Department of Labor Administration, Considered With Sections 501 and 504, Show Congressional Intent That Section 503 Be Enforced by Agency Action Only

A. Section 503 Specifies Limited Applicability and Describes Administrative Enforcement Mechanism

While one goal of the Act is to provide education and training for employment for all employable handicapped individuals, only employers with federal government contracts in excess of $2,500 are covered by Section 503. These contractors must take affirmative action to employ qualified handicapped individuals, unless the President determines the national interest requires waiver of this obligation.

Section 503(a) directs the President to promulgate regulations to implement the Act. Section 503(b) is very comprehensive in explaining how the Act is to be enforced and provides:

> If any handicapped individual believes any contractor has failed or refuses to comply with the provisions of his contract . . . [to take affirmative action] relating to employment of handicapped individuals, such individual may file a complaint with the Department of Labor The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the laws and regulations applicable thereto.

Section 503(b), 29 U.S.C. §793(b). The Act clearly requires the Department of Labor ("DOL") to investigate and to act upon each individual complaint.

1. Section 503 Promptly Implemented by DOL

The President delegated responsibility for promulgation of Section 503 Regulations to the DOL in Executive Order Number 11758, Section 2. The DOL published immediately effective regulations on June 11, 1974. 39 Fed. Reg. 20566. Current regulations incorporating the 1974 amendments to the Act have been in effect since April 16, 1976 and were published at 41 Fed. Reg. 16147; 41 C.F.R. §60-741, *et seq.*[3]

The Regulations give the DOL's Office of Federal Contract Compliance Programs (OFCCP) responsibility for enforcement of the Act, describe in detail the DOL-OFCCP mechanisms for enforcement and spell out contractor obligations and rights under Section 503. 41 Fed. Reg. 16147, 16148 (1976).

2. Regulations Provide Complaint Procedure Based on Individual Charges

Any employee of a covered federal contractor or applicant for employment with such a contractor may file a written complaint with the OFCCP if he believes that the Act or its Regulations have been violated. 41 C.F.R. §60-741.26(a). If the contractor has an internal review procedure for resolution of such complaints, the complaint must first be referred to the contractor. If there is no resolution "satisfactory to the complainant" within 60 days of the referral, the OFCCP must take over the case. 41 C.F.R. §60-741.16(b). Under Section 503(b), the OFCCP must institute a prompt investigation of *each* case, and the

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3. They were republished on October 20, 1978 at 43 Fed. Reg. 49276 (1978) after the DOL-OFCCP assumed responsibility for contractor compliance with Executive Order 11246, but no substantive changes were made in the Regulations affecting Section 503.

OFCCP is responsible for developing a complete case record in each matter. 41 C.F.R. §60-741.26(e).

If the OFCCP complaint investigation indicates no violation or if the agency decides not to initiate administrative or legal proceedings against the contractor, the complainant must be notified of the agency's decision. The individual may request review of the OFCCP finding or decision with 30 days. 41 C.F.R. §60-741.26(g)(1).

3. Informal Methods of Achieving Contractor Compliance and Employment for Complainant Preferred Under Regulations

If the OFCCP concludes that the contractor has not complied with the Act or Regulations, the agency must attempt to secure voluntary compliance through conciliation and persuasion. 41 C.F.R. §60-741.26(g)(2). Informal means are preferred over judicial or other more harsh procedures and must be used "whenever possible." Where an apparent violation is not resolved by these means, the Regulations direct the agency to take enforcement action. It may seek judicial enforcement of the Section 503 obligation, withhold progress payments on a job, terminate a contract and debar a contractor from doing business with the government. 41 C.F.R. §60-741.28.

4. Regulations Attempt to Guide Contractors in Ascertaining Responsibilities Under Act

One purpose for revising the Regulations in 1976 was "to give contractors more specific and detailed information regarding the extent of their obligations." *See* proposed Regulations 40 Fed. Reg. 39887 (Aug. 29, 1975) and the final Regulations, 41 Fed. Reg. 16147, 16148 (April 16, 1976). They make it clear that while contractors must recruit and employ handicapped persons, the extent of a

particular contractor's accommodation obligation must take into account business necessity, financial costs and expenses and other relevant factors. 41 C.F.R. §60-741.6(d).

5. OFCCP Has Vigorously Enforced Act and Regulations

In May, 1976, OFCCP Director Lawrence Lorber reviewed his agency's accomplishments in enforcing Section 503 before the Senate Subcommittee on the Handicapped and responded to Senator Williams' questions. He emphasized that the OFCCP has enforced Section 503 vigorously through its complaint procedures as well as through an extensive public information program designed to inform contractors about their Section 503 obligations. Oversight Hearings on Rehabilitation of the Handicapped Programs before the Subcomm. on the Handicapped of the Subcomm. on Labor and Public Welfare, 94th Cong., 2d Sess., pt. 3, 1579, 1595 (1976) ("1976 Oversight Hearings").

The OFCCP has worked extensively with the President's Committee on Employment of the Handicapped and with the Department of Health, Education and Welfare. Only one example of the public information aspect of the Section 503 enforcement program is the White House meeting held in 1975 to explain the Act's requirements to government contractors, union leaders, rehabilitation experts and representatives of the handicapped. As a result of this meeting, a layman's guide to the law was published for public distribution. *White House Conference. Equalizing the Handicap: A Guide to the Regulations of the Affirmative Action Requirements of Section 503 of the Rehabilitation Act of 1973.* ("White House Rep."). The Report states that Section 503 programs are not punitive in approach but rather that enforcement focuses on encouraging "employers to hire qualified handicapped people." White House Rep. at 8.

While the OFCCP has attempted to change stereotyped ideas concerning the abilities of handicapped individuals, it has also vigorously investigated individual complaints. By April 1, 1976, the OFCCP had received approximately 780 complaints of which over 400 had been closed satisfactorily to both complainant and contractor. The OFCCP averaged only 86 days between receipt of a complaint and final action on it. 1976 Oversight Hearings, pt. 3 at 1579, *et seq.*

In cases where it found coverage as well as a violation, the OFCCP has secured employment for complainants. Moreover, if the investigations disclosed company-wide problems, the OFCCP had obtained commitments on future compliance; where backpay was deemed necessary, it had been sought on behalf of the individual complainants or affected class. 1976 Oversight Hearings, pt. 3 at 1581, 1585-1586.

B. By Contrast, Sections 501 and 504 Specifically Contemplate Private Enforcement, at Least Since the 1978 Amendments Adding Section 505 to the Act

While Section 503 creates an agency enforcement mechanism for carrying out its obligation, the Acts Title V Section 501 (which governs federal employers) and Section 504 (which governs federal grantees) contain no statutory mechanisms for enforcement. Roadway urges that clear Congressional intent to enforce Section 503 through the DOL-OFCCP is apparent when one compares the three provisions.

Under Section 501, "[e]ach department, agency, and instrumentality" was required "within one hundred and eighty days after September 26, 1973" to "submit to the Civil Service Commission and to the [Federal Government Interagency Committee on the Handicapped Employees]

an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals in such department, agency or instrumentality." 29 U.S.C. §791.

As will be discussed at pages 18-21 *infra*, in House and Senate Committee proceedings prior to passage of the 1978 Amendments to the Act, spokesmen for organizations representing handicapped individuals urged amendment of Title V of the Act to provide for private court actions under Sections 501, 503 and 504. The 1978 Amendments in fact added Section 505(a)(1) which provides:

> The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964, including application of section 706(f) through 706(k), shall be available, with respect to any complaint under section 791 of this title, to any employer or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

29 U.S.C. §794a(a)(1).

Under Section 504, federal grant recipients may not discriminate based on handicap. It provides:

> No otherwise qualified handicapped individual in the United States, as defined in Section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving federal financial assistance.

29 U.S.C. §794. Like Section 501, Section 504 by its terms does not provide for administrative or court enforcement. Again, in the face of petitions by spokesmen for organizations representing handicapped individuals for creation of a private enforcement right, the 1978 Congress added a remedy and procedure section to Title V which governs Section 504 actions. Section 505(a)(2) provides:

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

29 U.S.C. §794a(a)(2).

1. *Expressio Unius Est Exclusio Alterius*

Where, as here, a statute creates a particular remedy or means of enforcement, the courts have long been wary of assuming the legislature intended to create others. *National R.R., Passenger Corp. v. National Association of R.R. Passengers*, 414 U.S. 453, 458 (1974).

2. Amendments to Title V Compel Conclusion That Court of Appeals Ruling Is Correct

Because Section 503 has a means of administrative enforcement and is flanked by sections which originally contained no enforcement mechanism but were amended to provide for federal court actions,[4] Congress' refusal to amend Section 503 can only be interpreted as compelling evidence of Congressional intent that no private cause of

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4. Clearly Section 501 plaintiffs may file court actions after exhaustion of agency procedures. *Cannon v. University of Chicago*, 441 U.S. 677 (1979) and *Lau v. Nichols*, 414 U.S. 563 (1974) which discuss rights under Title VI suggest that Section 504 plaintiffs may not be required to exhaust any agency procedures before initiating court actions.

action be allowed under Section 503. Its refusal to add to existing procedures under Section 503 calls for affirmance of the decision below even if there were no other factors supporting that decision.

C. Recent Supreme Court Decisions Emphasize Importance of Actual Statutory Provisions As Evidence of Congressional Intent; Section 503's Provision for Administrative Remedy Is Strong Evidence Congress Intended It As Exclusive Remedy

As the Court reiterated in *Touche Ross & Co. v. Redington,* 442 U.S. 560, 61 L.Ed.2d 82, 91 (1979), even if one assumes a federal statute has been violated:

> and some person harmed [that fact] does not automatically give rise to a private cause of action in favor of that person . . . instead, our task is limited solely to determining whether Congress intended to create the private right of action . . . and as with the case involving the interpretation of a statute, *our analysis must begin with the language of the statute itself.*

Id., 442 U.S. at 568, 61 L.Ed.2d at 91 (emphasis supplied).

The argument that the handicapped would benefit from making a private action available is simply not a proper basis from which to imply a private action.[5] Just as in *Touche Ross,* where the Court refused to infer such a right the provision in issue here is "flanked by provisions" which "expressly grant private causes of action." *Id.,* 442 U.S. at 571-572, 61 L.Ed.2d at 93.

The importance of Congressional expression of its intention with respect to enforcement through the language

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5. The decision in *Chaplin v. Consolidated Edison Co. of New York, Inc.,* 482 F.Supp. 1165, 1171 (S.D. N.Y. 1980), in which a private action under Section 503 was held available relies on this improper basis.

and structure of a statute was stated again in *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis,* 48 USLW 4001 (1979). The Court was urged to find a private cause of action under both Sections 206 and 215 of the Investment Advisers Act of 1940, 15 U.S.C. §§80b-6 and 80b-15. Section 206 of the Act makes it unlawful for any investment adviser "to employ any device, scheme or artifice to defraud . . . or to engage in any transaction, practice or course of business which operates as a fraud or deceit upon any client or prospective client" or to engage in specified transactions without making required disclosures. Section 215 provides that contracts whose formation or performance would violate the Act "shall be void . . . ."

First, the Court warned against placing undue "emphasis upon the desirability of implying private rights of action in order to provide remedies sought to effectuate the purposes of a given statute. . . ." *Transamerica, supra,* 48 USLW at 4002.

Then, distinguishing Sections 206 and 215, the Court decided it should infer a private action under Section 215 because its language "fairly implies a right to specific and limited relief in a federal court." *Id.*, 48 USLW at 4003. Since the provision declares certain types of contracts void, by its own terms the provision necessarily contemplates that the issue of voidness may be litigated. Congress must have assumed that Section 215 could be raised defensively in private litigation, but "the legal consequences of voidness are typically not so limited. A person with the power to void a contract ordinarily may resort to a Court to have the contract rescinded and to obtain restitution of consideration paid." *Id.*, 48 USLW at 4003. Thus, in accordance with the "typical" and "ordinary" consequence of voidness, the language of Section 215 was held to express

Congressional intent that a limited private action be available under that section.

Section 206 was held not to imply availability of private cause of action. Other provisions of the Investment Advisers Act do provide specific mechanisms for enforcement of Section 206. For example, Section 209 authorizes the Securities Exchange Commission to bring suit in federal court to enjoin violations of the Act or Rules promulgated under it. Express damage remedies are provided for misrepresentation in Section 11(a) of the Securities Act of 1933 and for certain material and misleading statements in Section 18(a) of the Securities Exchange Act of 1934. The Court reiterated, "[o]bviously, then, when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly." *Id.*, 48 USLW at 4004.

As the Court of Appeals below found with respect to Section 503:[6]

> [Section] 206 simply proscribes certain conduct, and does not in terms create or alter any civil liabilities. If monetary liability to a private plaintiff is to be found, it must read it into the Act. Yet it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a Court must be chary of reading others into it. "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." . . . Congress expressly provided both judicial and administrative means for enforcing compliance with §206 . . . In view of these express provisions for enforcing the duties imposed by §206, it is highly improbable that "Congress absent-mindedly forgot to

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6. *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1079 (5th Cir. 1980).

> mention an intended private action." *Cannon v. University of Chicago,* [441 U.S. at .....] (Powell, J., dissenting).

Transamerica, supra, 48 USLW at 4003.[7]

Roadway respectfully urges that, following these recent cases, the statutory language of Section 503 providing for an administrative remedy, considered with Sections 501 and 504 (its companion provisions of Title V), and with Section 505(a) granting actions under Sections 501 and 504 fully attest Congressional intent that enforcement procedures under Section 503 be limited to those provided by the Department of Labor-OFCCP under Section 503(b)(2). The legislative history of Section 503 and related provisions of Title V confirm the correctness of Roadway's analysis of Congressional intent, and unlike the history presented in *Cannon v. University of Chicago,* 441 U.S. 677 (1979), does not suggest that a private cause of action should be inferred.

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7. Again, in *Kissinger v. Reporters' Committee for Freedom of the Press,* 48 USLW 4223 (1980), the Court said it:

> has spent too many pages identifying the factors relevant to uncovering congressional intent to imply a private cause of action to belabor the topic [citations omitted]. Our most recent pronouncement on the subject, *Transamerica Mortgage Advisors, Inc. v. Lewis,* ..... U.S. ..... (1979), readily disposes of the question. First, the language of the Records Acts merely "proscribe certain conduct" and do not "create or alter any civil liabilities." *Id.,* at ..... The Records Acts also expressly provides administrative remedies for violations of the duties it imposes, implicating our conclusion in *Transamerica Mortgage* that it is "an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Id.,* at ..... Finally, the legislative history does not detract from the inference to be drawn from Congressional silence, but rather confirms that such silence is purposeful.

Id., 48 USLW at 4226.

II.

Legislative History, Agency Action and Historical Context in Which Section 503 Enacted Provide Further Evidence That Congress Intended Section 503 Enforcement Solely Through DOL-OFCCP Proceedings

As recognized by the Court in *Rogers, supra,* 611 F.2d at 1081, there is scant legislative history explaining Congressional intent with respect to Section 503 at the time the Act was enacted in 1973 or even when the Act was amended to expand the definition of "handicap" in 1974. One Senate Report states the Committee's intent "that Sections 503 and 504 should be administered in a 'consistent' manner." S. Rep. No. 93-1297, 93d Cong., 2d Sess., 27, *reprinted in* [1974] U.S. Code Cong. & Ad. News, 6373, 6390-91. In the next paragraph of the Report, the Senate directs the Secretary of Health, Education & Welfare to coordinate the Section 504 enforcement. This brief reference to consistency and uniformity in the federal approach to discrimination directs DOL and HEW "not to work at cross purposes or to duplicate each other's efforts and was not intended to suggest "that identical methods of enforcement were envisioned", even if one assumes a federal cause were available under Section 504 before 1978. *Anderson v. Erie Lackawanna Ry. Co.,* 458 F.Supp. 934, 939 (E.D. Ohio 1979); *Chaplin v. Consolidated Edison Co. of New York, Inc.,* 482 F.Supp. 1165, 1169 (S.D. N.Y. 1980); *Rogers, supra,* 611 F.2d at 1081.

A. Oversight Hearings by Congressional Committees and Hearings Prior to 1978 Amendments Reflect Congressional Intent As to Section 503 Enforcement

While caution must be exercised in relying on post-enactment expressions of Congressional intent, *Cannon v.*

University of Chicago, 441 U.S. 677, 686, n.7 (1979), where, as here, Congress has amended provisions of a statute in light of hearing testimony and Congressional comments, these legislative materials are weighty evidence of intent. On at least five occasions since 1974, spokesmen for various organizations representing the interests of handicapped individuals have specifically criticized Title V as constituted before the 1978 Amendments for failing to provide explicitly for private causes of action in Sections 501, 503 and 504, and they have petitioned Congress to amend those sections. In 1976, Senator Williams, Chairman of the Senate Committee on Labor and Public Welfare, and the other members of the Committee were asked to amend Section 503 specifically to permit private suits by individuals. 1976 Oversight Hearings, pt. 3, 1623-24 (1976) (statements of Ms. Farham and Mr. Goldberg).

A similar request was made by Debrah Kaplan on behalf of the Disability Rights Center in 1977. In hearings on proposed amendments to Section 501, Ms. Kaplan requested an amendment to provide "a legal right of action into Federal Court." She pointed out that:

> Some [Section 501 plaintiffs] have had their cases dismissed [from Federal Court] because the statute does not provide for a private right of action. Other Courts have realized that the Congressional intent for such a right can be found in other statutes or implied by the existence of Section 501 itself. However, since the Courts are divided on this issue, *it is imperative that Congress act, and specify that the disabled have the same rights as others to proceed into Court.*

Hearings on the Rehabilitation Extension Amendments of 1977 before the Subcomm. on the Handicapped of the

Senate Comm. on Human Resources, 95th Cong., 1st Sess., 393, 395 (1977) (emphasis supplied).

Speaking to the Senate Committee on Governmental Affairs, Mr. Reese Robrahan urged passage of H.R. 9804 (the Civil Rights Act of 1977), specifically because it would provide:

> A right of action for handicapped persons, eliminating the existing question as to whether such a right of action exists for handicapped persons under Section 501 and Section 503 of the Rehabilitation Act, as amended.

Hearings before the S. Comm. on Governmental Affairs on Reorganization Plan No. 1 of 1978, 95th Cong., 2d Sess., 450-51 (1978) (statement of Reese S. Robrahan, Esquire, on behalf of the American Coalition of Citizens with Disabilities and the American Council of the Blind).

The House of Representatives was also informed that the Courts were not implying private causes of action from the provisions of Title V as originally enacted. On September 12, 1977, Mr. Robrahan urged the House Subcommittee on Select Education to:

> Recommend the introduction of a Bill or Bills which would: (1) create an express individual right of action before the judiciary under Sections 501, 503 and 504, of the Rehabilitation Act of 1973 . . . like those provided for in other similar civil rights statutes. . . .

Hearings before the Subcomm. on Select Education of the House Comm. on Education and Labor, 95th Cong., 1st Sess., 164 (1977) (statement of Reese H. Robrahan, Esquire, on behalf of the American Council of the Blind and the American Coalition of Citizens with Disabilities).

In more recent hearings before the same Subcommittee on April 11, 1978, Ms. Kaplan urged amendment of Section

501 because under the pre-amendment provisions of Title V, a Section 501 "complainant will not be able to have access to the federal courts, as is true for complainants alleging discrimination based on race or sex, until they have exhausted their administrative remedies. . . ." Further, she expressed concern since there was then no statute expressly authorizing civil action after exhaustion of agency procedures, review by federal court of any agency action would be limited in scope. Oversight Hearings on the Rehabilitation Act of 1973 before the Subcomm. on Select Education of the House Comm. on Education and Labor, 95th Cong., 2d Sess., 666, 674-75 (1978) (statement of Debrah Kaplan, Director, Disability Rights Center).

As recognized by the Court in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), it is imperative that the complete legislative history of a law be studied to ascertain Congressional intent with respect to enforcement. Roadway urges that if prior tothe 1978 amendments it were already clear to the Congressional committees that private causes of action then existed under Sections 501, 503 and 504, there should be some evidence of this fact through the several colloquies between Congressmen and the organization representatives cited above. If no amendments to Title V had been made in 1978, the absence of any response by Congress on this issue might be somewhat more equivocal, but that Congress acted to provide procedures for Court action in Sections 501 and 504 without changing Section 503 is weighty evidence of Congressional intent as to Section 503 enforcement.

B. Congressmen and DOL Administrators Have Understood Section 503 Provides Only for Agency Action Since the Act Was First Enacted

Representative Vanik, who introduced Section 503 and actually wrote Section 503(b), was apparently satisfied

that the administrative mechanism was adequate to ". . . establish protections and mechanisms in the law" as he described the provision to his colleagues. 119 Cong. Rec. 7114 (1973).

Shortly after passage of the Act, the Senate Committee charged with overseeing enforcement of the Rehalibitation Act noted that the DOL had worked closely with the staff of the Senate Subcommittee on Labor and Public Welfare and the House Committee on Education and Labor to develop regulations and enforcement policies "to ensure that the implementation of the provisions of the Act would be accomplished in accordance with the intent of Congress." S. Rep. 93-1297, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News, 6376).

In 1976, while explaining the provisions of the final Section 503 regulations to the Senate Subcommittee on the Handicapped, OFCCP Director Lawrence Lorber noted that the final regulations were developed in close consultation with the Senate Committee and Subcommittee in order to "mirror the Congressional intent and provide a vehicle for effective enforcement of the statute." 1976 Oversight Hearings, pt. 3, at 1592.

During the 1976 Oversight Hearings, the Subcommittee inquired into the methods and efficiency of the OFCCP in investigating and enforcing Section 503 complaints. Mr. Lorber tracked the provisions of the DOL regulations, 41 CFR §§60-741, *et seq.*, from the filing of a complaint through administrative appeal of a decision. 1976 Oversight Hearings, pt. 3, at 1601-02, 1615. He noted the agency's position that an aggrieved party may obtain review of final agency action on a complaint by the federal court. 1976 Oversight Hearings, pt. 3, at 1602.

More recently during the fiscal year 1978 Appropriations Hearings, Senator Eagleton questioned Harold Rus-

sell, the Chairman of the President's Committee on the Handicapped, and John B. Mumford, the Acting Assistant Secretary for the DOL's Employment Standards Division, which oversees the OFCCP. In their colloquy concerning the Section 503 enforcement program, it is clear that the DOL, as well as Congress, then viewed the OFCCP administrative procedure as the only complaint procedure authorized under Section 503.

> Senator Eagleton. What remedy is available for a handicapped individual who seeks employment in a private company and that employment is denied him, and he thinks he can prove it was denied him because he was handicapped, yet he thinks he can do the job for which he applied?
>
> Mr. Russell. He can file a complaint with the Department of Labor with all of the data necessary. The Department of Labor will take action to reconcile, investigate it, and bring forth the action necessary to give this individual the opportunity to see if his claim is valid.
>
> Senator Eagleton. If need be, a hearing and hearing examiner in the Department will hear the grievance?
>
> Mr. Mumford. That's right.

Fiscal Year 1978 Hearings before the Comm. on Appropriations [for the] Departments of Labor and Health, Education & Welfare and Related Agencies Appropriations, 95th Cong., 1st Sess., 271 (1977) ("1978 Fiscal Year Hearings").

The President's Commission on the Handicapped is charged with providing information on Section 503 rights and responsibilities to the public. That it consistently refers only to the DOL-OFCCP complaint procedure pro-

vides additional strong evidence that only DOL enforcement of Section 503 was envisioned by Congress. The Commission on the Handicapped has flatly stated that "[t]he Department of Labor's decision is final" on Section 503 complaints. 1978 Fiscal Year Hearings at 270; White House Rep. at 8.

C. When Section 503 Was Enacted in 1973 and to the Present, Congress Has Explicitly Provided for Private As Well As DOL or Other Agency Enforcement of Employment Laws When Dual Enforcement Schemes Were Envisioned

Private causes of action are specifically authorized in addition to agency action in many federal employment statutes. *See, e.g.*, the Equal Pay Act, 29 U.S.C. §206, passed in 1963; the Age Discrimination in Employment Act, 29 U.S.C. §626, passed in 1967; the Fair Labor Standards Act, 29 U.S.C. §201, passed in 1938; the Civil Rights Act of 1964, 42 U.S.C. §2000e-5, as amended in 1972; the National Labor Relations Act, 29 U.S.C. §185, as amended in 1947; and the Farm Labor Contractor Registration Act, 7 U.S.C. §2050a, as amended in 1974.

Notably, Congress did not provide for private actions under Title VII, the NLRA, or FLCRA until it had an opportunity to study operation of these Acts and to determine whether other remedies should be provided. In 1974 when FLRCA was amended, the Rehabilitation Act was also amended without change in regard to enforcement. In providing for a private cause of action under FLCRA, Congress was definite in both its statutory language and in its comments on the purpose for that amendment. It was expressly concerned that under the pre-amendment statute there was a "lack of adequate statutory authority . . . to deter and correct abuses of migrant workers . . .,"

and it stated that the amendment "creates a federal civil remedy for persons aggrieved." S. Rep. 93-1295, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News, 6443-50.

As the Court recognized in *Cannon v. University of Chicago,* 441 U.S. 677 (1979), post-1972 Supreme Court decisions have applied a strict approach to consideration of whether a private cause of action should be implied under a statute if, as in the instant case, the class of persons intended to be benefited by the statute does have the ability to activate and to participate in a statutorily provided administrative complaint procedure.

When the Rehabilitation Act was passed in 1973, it was already apparent that the Courts were not going to infer a private cause of action under its models, Executive Order 11246 or its predecessor Order 10925, which impose fair employment obligations on government contractors with respect to race, sex, religion, color and national origin. By 1976, even the Department of Labor recognized that the Order "does not create a private right to action against the contractor which the complainant may pursue in a Court of law. . . ." 46 Fed. Reg. 40352 (1976). *Farkas v. Texas Instruments, Inc.,* 375 F.2d 629 (5th Cir.), *cert. denied,* 389 U.S. 977 (1967); *Farmer v. Philadelphia Electric Co.,* 329 F.2d 3, 8 (3rd Cir. 1964), Congressional apprehension of how Section 503 would be interpreted was not colored as it may have been with respect to Title IX of the Education amendments of 1972, 20 U.S.C. §§1681, *et seq.*[8]

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8. Title IX which adds sex as a prohibited classification is modeled on Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d. "[T]he critical language in Title VI had already been construed as creating a private remedy." *Cannon v. University of Chicago,* 441 U.S. at ....., 60 L.Ed.2d at 575.

By 1973 and throughout the decade, the Courts refused to infer private causes of action under numerous statutes governing the employee-employer relationship.[9]

D. Majority of Courts Considering Section 503 Had Refused to Allow Private Actions When 1978 Amendments Passed

As reflected in the testimony of at least five witnesses before Congressional Committees prior to 1978, decisions holding no private action should be inferred under Section 503 had been reached by the Courts in *Moon v. Roadway Express, Inc.*, 439 F.Supp. 1308 (N.D. Ga. 1977); *Rogers v. Frito-Lay, Inc.*, 433 F.Supp. 200, 202 (N.D. Texas 1977); *Wood v. Diamond State Telephone Co.*, 440 F.Supp. 1003

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9. *See, e.g.*, the following decisions of the Court of Appeals for the Fifth Circuit and cases cited therein. *United States v. Lovknit Manufacturing Co., Inc.*, 189 F.2d 454 (5th Cir. 1951) (employee has no implied private cause of action under Walsh-Healey Act, 41 U.S.C. §§35-45); *Dodd v. Blackstone Cleaners, Inc.*, 61 Lab. Cases ¶32,281 (N.D. Tex. 1969) (employee has no implied right of action under Service Contract Act, 41 U.S.C. §§351-57); *Breitwieser v. KMS Industries, Inc.*, 467 F.2d 1391 (5th Cir. 1972), *cert. denied*, 410 U.S. 969 (1973) (no implied right of action to bring a wrongful death action based on violation of child labor provisions of Fair Labor Standards Act, 29 U.S.C. §212); *Flores v. George Braun Packing Co.*, 482 F.2d 279 (5th Cir. 1973) [(no implied private right of action against an employer for deprivation of a job based on the alleged employment of Mexican nationals illegally in the United States under the Immigration and Nationality Act, 8 U.S.C. §§1101(a)(15)(A)(ii), 1182(a)(14))]; *Hines v. Cenla Community Action Commission, Inc.*, 474 F.2d 1052 (5th Cir. 1973) (no implied private right of action for discharge under the Economic Opportunity Act, 42 U.S.C. §2796; *Martinez v. Behring's Bearings Service, Inc.*, 501 F.2d 104 (5th Cir. 1974) (no implied private right of action for wrongful death under Fair Labor Standards Act, 29 U.S.C. §216(a)(3)).

In addition, the Courts of Appeal for the Fourth and Sixth Circuits had held no private right of action exists under the Occupational Safety and Health Act. 29 U.S.C. §§651-78. *Byrd v. Fieldcrest Mills, Inc.*, 496 F.2d 1323 (4th Cir. 1974); *Russell v. Bartley*, 494 F.2d 334 (6th Cir. 1974). The Fifth Circuit adopted this view in 1975 in *Jeter v. St. Regis Paper Co.*, 507 F.2d 973 (5th Cir. 1975).

(D. Del. 1977); and *Hoopes v. Equifax, Inc.*, 22 FEP Cases 957 (S.D. Ohio 1977), *aff'd*, 611 F.2d 134 (6th Cir. 1979).[10] The only cases then reported in which a private cause of action had been held available, *Drennan v. Philadelphia General Hospital*, 428 F.Supp. 809 (E.D. Pa. 1977) and *Duran v. City of Tampa*, 430 F.Supp. 75 (M.D. Fla. 1977) mixed analysis of the Section 503 issue with the discussion of Section 504. The bases of those rulings are unclear. Especially in *Drennan* which stayed the case pending DOL action, it is uncertain whether the Court actually intended to provide an independent cause of action or to provide an avenue for review of agency action.

E. The Instant Case Is Different From Cases in Which Private Actions Have Been Judicially Inferred

Indeed, the Courts have permitted private complainants access to the federal courts under statutes through implied actions only in three types of cases: (1) where the suit's purpose is to force the administrative agency to take action required by the statute, *e.g., Scott v. Parham*, 69 FRD 324 (N.D. Ga. 1975); (2) where "[a]bsent an implied remedy . . . [the beneficiary would] have no protection under the statute since there was no other effective enforcement mechanism directed at the employers," *e.g., Gomez v. Florida State Employment Service*, 417 F.2d

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10. More recent cases finding no private cause of action under Section 503 include *Anderson v. Erie Lackawanna Ry. Co.*, 468 F.Supp. 934, 939 (E.D. Ohio 1979), adopted by the Court of Appeals for the Sixth Circuit in *Hoopes v. Equifax, Inc.*, 611 F.2d 134 (6th Cir. 1979); *Coleman v. Noland Co.*, 21 FEP Cases 1248 (W.D. Va. 1980); *Doss v. General Motors Corp.*, 478 F.Supp. 139 (C.D. Ill. 1979); *Jessup v. Chicago & Eastern Illinois R.R.*, No. 78-C-519 (N.D. Ill. 1978); *Miglets v. Erie Lackawanna Ry. Co.*, 19 FEP Cases 379 (E.D. Ohio 1979); *Moon v. Santa Fe Ry. Co.*, 22 FEP Cases 1252 (D. Kan. 1980).

569 (5th Cir. 1969);[11] and (3) where a provision of a statute would have no application if it were not intended to imply that individuals may file private actions in federal court, *e.g., McDaniel v. University of Chicago,* 548 F.2d 689 (7th Cir. 1977).

F. Other Historical Factors and Legislative History Relied on by Petitioners Fail to Show Basis for Inferring Private Action

When a historical failure of efforts to amend Title VII to include handicapped as a protected category is considered in light of requests by spokesmen of organizations representing handicapped individuals discussed, *supra,* at pages 18-21), Congress' refusal to amend Title VII is clearly another significant factor weighing against a conclusion that Congress intended to permit a private cause of action under Section 503. It is, of course, recognized that a recent Senate Report authored by Senator Williams indicates his belief that a private cause of action is available under Title V and that amendment of Title VII would serve purposes other than creation of a private right of action. S. Rep. No. 96-316, 96th Cong., 1st Sess., 12-13 (1979). As the Court below recognized, however, the remark is distant in time from enactment of Section 503 and is the product of only one committee. It cannot be accepted "as an accurate expression of the earlier Congress' intent."

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11. The decision of the Court in *Cannon v. University of Chicago,* 441 U.S. 667 (1979) is based on this rationale, as well as the peculiar legislative and judicial history of the statute in issue there. *See also, Davis v. Passman,* 442 U.S. 228 (1979) justified on this basis and *Chrysler Corp. v. Brown,* 441 U.S. 281 (1979) where no private action was held available in part because Chrysler could seek protection under the Administrative Procedure Act, 5 U.S.C. §701. That remedies are available to individual Section 503 complainants also distinguishes the instant case from *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971) and *J. I. Case Co. v. Borak,* 377 U.S. 426 (1964).

Rogers, supra, 611 F.2d at 1082. Moreover, the Committee Report's reference to a federal court proceeding under Title V is ambiguous. It may refer only to a right of judicial review of agency action as the DOL has always assumed complainants have and as this Court has agreed they have in similar cases, *e.g., Kissinger v. Reporters' Committee for Freedom of the Press,* 48 USLW 4223 (1980). The Committee Report then may refer to private federal court proceedings of a private nature with respect to Sections 501 and 504 and to review of agency action with respect to Section 503.

Similarly, reference to the attorneys' fees provision added by the 1978 Amendments in Section 505(b), 29 U.S.C. §794a(b) is ambiguous. The provision does not specify that attorneys' fees are available in Court actions under Section 503. The provision states that:

> In any action or *proceeding to enforce* or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party other than the United States, a reasonable attorney's fees as part of the cost.

Section 505(b), 29 U.S.C. §794a(b) (Emphasis supplied). Again, the language may only contemplate fees in actions brought against the government to enforce the obligations of Section 503 or proceedings brought to review agency actions. Section 505 simply does not describe what type of Court action is available under Section 503.

In conclusion, no argument advanced by Petitioners is a proper legal basis from which to infer intent to create a private action. Section 503 and Title V's legislative history, historical context and the other factors outlined above support the conclusion that the explicit procedure described in Section 503(b) is the only procedure Congress intended.

III.

Under Traditional *Cort* Analysis the Absence of Congressional Intent to Imply a Private Cause of Action Is Clear

Under the analysis stated in *Cort v. Ash,* 422 U.S. 66 (1975), as clarified in *Touche Ross & Co. v. Redington,* 442 U.S. 560 (1979) and other recent decisions, it is clear "that mechanical adherence to any multiple part test is injurious . . . ." *Rogers, supra,* 611 F.2d at 1078. In finding a private cause of action under Section 503, the Court in *Chaplin v. Consolidated Edison Co. of New York, Inc.,* 482 F.Supp. 1165 (S.D. N.Y. 1980), relied on suggestions by the Department of Labor that allowing a private cause of action would not interfere with its enforcement efforts but would facilitate them by having a "sobering effect on the parties involved." This argument does not stand on thorough examination. To permit a private right of action would place contractors, who have complied with official OFCCP requirements, at risk of liability under varying interpretations of Section 503 as they develop throughout the Courts. Given a private cause of action, Section 503 OFCCP procedures would likely be used only as stepping stones to Court, if not bypassed altogether. Contractors would be leary of attempting resolution by conciliation since the complainants could at any time decide simply to initiate court proceedings. The Courts in *Rogers v. Frito-Lay, Inc.,* 433 F.Supp. 200 (N.D. Tex. 1977) and *Wood v. Diamond State Telephone Co.,* 440 F.Supp. 1003 (D. Del. 1977) both noted that the plaintiffs had apparently eschewed OFCCP conciliation efforts in the hope of obtaining more money through court proceedings.

The OFCCP's ability to oversee federal contractors, as Section 503 requires it to do, would unquestionably be impaired since it would not be involved in every case

and since standards would be developed judicially rather than administratively. With Section 503 enforcement mechanisms under the DOL which also administers the Occupational Safety and Health Act, the Agency now has an effective opportunity to reconcile the sometimes competing requirements of the two laws. 1976 Oversight Hearings, pt. 1 at 469. It would be an anomalous result to preclude the DOL from using its expertise to resolve questions where the competing policies of the laws must be reconciled. If a Court action were permitted under Section 503, binding precedents in this area would be set in private litigation where it is unlikely that the ramifications on OSHA policies will be considered by the litigants or the Courts. This result would certainly not be in accord with the administrative scheme envisioned by OSHA or Section 503(b). The Court has long refused to permit private rights of action which would be inconsistent with or inimicable to operation of a statutory administrative procedure, *e.g., McKart v. United States,* 395 U.S. 185, 195 (1969), and the Court should not permit private Court actions under Section 503.

The administrative enforcement scheme of Section 503 provides prompt resolution to both complainants and contractors, *supra,* at page 10. Implication of a private action would subject contractors to years' long procedures and delays now common in Federal Court civil litigation. That result would be contrary to the federal policy "to encourage relatively rapid disposition of labor disputes." *UAW v. Hoosier Cardinal Corp.,* 383 U.S. 696, 707 (1966).

Since Section 503(c) of the Act empowers the President to waive all Section 503 requirements in the interest of national security, implication of a private cause of action would place the Court in the position of possibly rendering decisions in conflict with Presidential action empowered by the statute.

The number and complexity of factors involved in determining coverage and obligations under Section 503 make enforcement particularly appropriate for expert agencies such as the OFCCP and particularly inappropriate for private party litigation in the Federal Courts. As the plurality of the Court stated in *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973): "what differentiates sex from such non-suspect classes as intelligence or physical disability . . . is that the sex characteristic frequently bears no relationship to the ability to perform or to contribute to society." Petitioners rely heavily on the assumption that they are both members of a class for whose *especial* benefit Section 503 was enacted. Making the decisions as to whether a particular individual is in fact qualified for employment—what reasonable accommodation can be required considering business needs, cost and other factors—clearly present myriad and complex questions which are more suitable for resolution in an administrative agency forum. There the give and take of conciliation and the agency expertise can be applied as it cannot be effectively used in the adversarial forum of the Federal Courts.

Finally, while the Courts have generally assumed that regulation of the employment of the handicapped is not a traditional area of state concern, this analysis begs the more fundamental point. Regulation of the private employment relationship has traditionally been an area of state, not federal, concern. Where Congress has seen fit to preempt state law or to provide protections not available under state law, it has legislated its intent with respect to rights, remedies and procedures with such specificity as to leave no doubt whether the individual is limited to agency action or may resort to the Courts. *See* pages 24-26, *supra*.

CONCLUSION

For all of these reasons Roadway respectfully urges that the decision of the Court of Appeals is correct. It is in accord with applicable precedent and review by this Court is not required.

Respectfully submitted,

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APPENDIX

Applicable Provisions of Title V of the Rehabilitation Act of 1973, As Amended

Section 501, 29 U.S.C. §791:

Employment of handicapped individuals

Interagency Committee on Handicapped Employees; establishment; membership; co-chairmen; availability of other Committee resources; purpose and functions

(a) There is established within the Federal Government an Interagency Committee on Handicapped Employees (hereinafter in this section referred to as the "Committee"), comprised of such members as the President may select, including the following (or their designees whose positions are Executive Level IV or higher): the Chairman of the Civil Service Commission, the Administrator of Veterans' Affairs, and the Secretaries of Labor and Health, Education, and Welfare. The Secretary of Health, Education, and Welfare and the Chairman of the Civil Service Commission shall serve as co-chairman of the Committee. The resources of the President's Committees on Employment of the Handicapped and on Mental Retardation shall be made fully available to the Committee. It shall be the purpose and function of the Committee (1) to provide a focus for Federal and other employment of handicapped individuals, and to review, on a periodic basis, in cooperation with the Civil Service Commission, the adequacy of hiring, placement, and advancement practices with respect to handicapped individuals, by each department, agency, and instrumentality in the executive branch of Government, and to insure that the special needs of such individuals are being met; and (2) to consult

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with the Civil Service Commission to assist the Commission to carry out its responsibilities under subsections (b), (c), and (d) of this section. On the basis of such review and consultation, the Committee shall periodically make to the Civil Service Commission such recommendations for legislative and administrative changes as it deems necessary or desirable. The Civil Service Commission shall timely transmit to the appropriate committees of Congress any such recommendations.

Federal agencies; affirmative action program plans

(b) Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall, within one hundred and eighty days after September 26, 1973, submit to the Civil Service Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of handicapped employees are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission, if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for handicapped individuals.

State agencies; rehabilitated individuals, employment

(c) The Civil Service Commission, after consultation with the Committee, shall develop and recommend to the Secretary for referral to the appropriate State agencies, policies and procedures which will facilitate the hiring, placement, and advancement in employment of individuals

who have received rehabilitation services under State vocational rehabilitation programs, veterans' programs, or any other program for handicapped individuals, including the promotion of job opportunities for such individuals. The Secretary shall encourage such State agencies to adopt and implement such policies and procedures.

Report to Congressional committees

(d) The Civil Service Commission, after consultation with the Committee, shall, on June 30, 1974, and at the end of each subsequent fiscal year, make a complete report to the appropriate committees of the Congress with respect to the practices of and achievements in hiring, placement, and advancement of handicapped individuals by each department, agency, and instrumentality and the effectiveness of the affirmative action programs required by subsection (b) of this section, together with recommendations as to legislation which have been submitted to the Civil Service Commission under subsection (a) of this section, or other appropriate action to insure the adequacy of such practices. Such report shall also include an evaluation by the Committee of the effectiveness of the Civil Service Commission's activities under subsections (b) and (c) of this section.

Federal work experience without pay; non-Federal status

(e) An individual who, as a part of his individualized written rehabilitation program under a State plan approved under this chapter, participates in a program of unpaid work experience in a Federal agency, shall not, by reason thereof, be considered to be a Federal employee or to be subject to the provisions of law relating to Federal employment, including those relating to hours of work, rates of compensation, leave, unemployment compensation and Federal employee benefits.

Federal agency cooperation; special consideration for positions on President's Committee on Employment of Handicapped

(f)(1) The Secretary of Labor and the Secretary of Health, Education, and Welfare are authorized and directed to cooperate with the President's Committee on Employment of the Handicapped in carrying out its functions.

(2) In selecting personnel to fill all positions on the President's Committee on Employment of the Handicapped, special consideration shall be given to qualified handicapped individuals.

Pub.L. 93-112, Title V, § 501, Sept. 26, 1973, 87 Stat. 390.

Section 503, 29 U.S.C. §793:

Employment under Federal contracts

Amount of contracts or subcontracts; provision for employment and advancement of qualified handicapped individuals; regulations

(a) Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 706(6) of this title. The provisions of this section shall apply to any subcontract in excess of $2,500 entered into by a prime contractor in carrying out any contract for the procurement of personal property and

nonpersonal services (including construction) for the United States. The President shall implement the provisions of this section by promulgating regulations within ninety days after September 26, 1973.

Administrative enforcement; complaints; investigations; departmental action

(b) If any handicapped individual believes any contractor has failed or refuses to comply with the provisions of his contract with the United States, relating to employment of handicapped individuals, such individual may file a complaint with the Department of Labor. The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.

Waiver by President: national interest special circumstances for waiver of particular agreements

(c) The requirements of this section may be waived, in whole or in part, by the President with respect to a particular contract or subcontract, in accordance with guidelines set forth in regulations which he shall prescribe, when he determines that special circumstances in the national interest so require and states in writing his reasons for such determination.

Pub.L. 93-112, Title V, § 503, Sept. 26, 1973, 87 Stat. 393.

Section 504, 29 U.S.C. §794:

Nondiscrimination under Federal grants

No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title,

shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Pub.L. 93-112, Title V, § 504, Sept. 26, 1973, 87 Stat. 394.

Section 505, 29 U.S.C. §794a:

Remedies and attorney fees

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964, including the application of sections 706(f) through 706(k), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Pub.L. 93-112, Title V, § 505, as added Pub.L. 95-602, Title I, 120, Nov. 6, 1978, 92 Stat. 2982.

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